

52494

LORA ELSIE MC KINNEY,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
HIGH-LOW FOODS, INC., an Illinois	)	Honorable Elmer N. Holmgren,
Corporation,	)	Presiding.
)	
Defendant-Appellee.)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order granting the motion of the defendant for a directed verdict at the close of the plaintiff's evidence and entering judgment in favor of defendant, High-Low Foods, Inc., a corporation, and against the plaintiff, Lora Elise McKinney. Plaintiff also appeals from the order denying her motion to vacate and set aside the directed verdict and to grant her a new trial.

At the trial, the plaintiff produced three witnesses as to the issue of liability: the plaintiff herself; her husband, with whom she was shopping in the defendant's self-service supermarket when she sustained the personal injuries complained of; and the defendant's produce manager, who had allegedly arranged the display of beer bottles which contributed to the plaintiff's personal injuries and who was called as an adverse witness under Sec. 60 of the Civil Practice Act.

The plaintiff testified that she went shopping with her husband at defendant's self-service supermarket on a Saturday morning at approximately 9:30 A.M. Her husband pushed the cart and both parties filled it with products. When they came to the last long aisle in the store, her husband parked the cart there. The plaintiff was in front of the cart and was looking at the products in the dairy cooler when she heard a crash and something hit her foot. Looking down, she saw that her left foot was cut and was

bleeding badly. The plaintiff then walked to the front of the store and past the check-out lines. An unnamed man then took her in his car to a hospital where she later underwent an operation causing her to be hospitalized for four days.

The plaintiff stated that a stack of beer cartons was in the last long aisle of defendant's supermarket. This display was located near the end of the dairy cooler and was stacked against it. The carton on the bottom of the stack was resting on the floor. The plaintiff and her husband were in this vicinity when she was struck in the foot by some object. Continuing, the plaintiff testified that this stack of beer cartons was four or five feet high, and this last aisle, where the display of beer cartons was located, was very crowded that Saturday morning. The meat and dairy coolers were located in this aisle. The rest of her testimony on direct examination had to do with proof of damages and not proximate cause, which chiefly concerns us in this appeal.

On cross-examination, the plaintiff testified that the lighting near the display was good, as was the condition of the floor. She saw the beer cartons as she and her husband came around the corner in the back of the store and into its last long aisle. The display looked like quart bottles of beer in cardboard boxes. The boxes were stacked on top of each other to a height of four or five feet. The display in question only contained one continuous stack of beer cartons. She did testify that the top carton was open enabling customers to buy one quart of beer at a time if they wished. She did not know if only the top carton in this display was open, and she did not see anything that caused the beer bottles to fall. She was not looking at her husband or the beer display when she was struck on the foot.

Continuing, the plaintiff stated on cross-examination

that she had been in this particular supermarket twenty-five or thirty times and had never seen beer, in glass bottles, stacked or displayed in this manner. On prior shopping occasions she had never been in the store when beer was on sale. At the time of the injury to her foot, her cart was at least half full. The cases of beer in the display were all stacked lengthwise. After her foot had been cut, the plaintiff looked around her and saw broken glass. The floor was wet. She did not know what had happened. When she had passed over the floor immediately before her injury, it was not wet or littered. She did not see any of the beer cartons on the floor after her foot was cut. At this time, her husband was six or eight feet behind her in the same aisle. The plaintiff could not tell how many feet the beer display extended into the aisle.

Fred Riecke, produce manager at defendant's supermarket, was called by the plaintiff as an adverse witness under section 60 of the Civil Practice Act [Ill. Rev. Stat. (1965) ch. 110, §60]. He took the plaintiff to the hospital. She had been injured by a bottle being broken in the supermarket that Saturday morning. Saturday was the busiest day of the week in the defendant's supermarket, and it was crowded the morning in question. The stack of beer cartons was placed in the aisle of the store that had the heaviest traffic. Each carton contained twelve quart-size bottles of beer.

Continuing, this witness stated that he had done all the stacking in the defendant's supermarket at one time or another. He did not remember if he had stacked the cartons of beer in the particular aisle in which the plaintiff sustained her injury. There were no other aisles that he could stack quart-sized bottles of beer. He stacked the beer in the usual and customary manner which meant the bottom carton was placed on the floor of the aisle

and the other two or three cartons were placed on top of the bottom carton resulting in a beer display containing three or four cartons. The top of the third carton would be cut off so as to expose the bottles, and the top of the fourth carton would be cut off also, but only if the third carton was full.

The witness did not recall which of the beer cartons stacked in the display were cut off at the top. He did testify that in his pre-trial discovery deposition he had stated that the beer cartons were normally stacked on a base for solidarity; that the bottom cardboard container was not cut, but that the tops of the other two or three cartons resting on the base carton were cut half-way down so as to expose the tops of the bottles in these cartons; that as a result, the cardboard bottoms of the top two or three cartons rested on the bottle caps of the quart bottles of beer in the carton immediately below them. Concluding, this witness testified that this beer display was exposed to customer traffic on three sides, and it was possible that it obstructed the aisle in which the plaintiff sustained her injury.

In response to questions from defendant's counsel, this witness stated that he did not see the beer display the morning of the plaintiff's injury, and he was not in charge of constructing displays at that time. On the way to the hospital, he had a conversation with the plaintiff in which she stated that her husband had knocked over some beer in the supermarket. The witness went on to say that the plaintiff's injury occurred in the largest aisle of the store which also had the heaviest traffic. In view of the width of this aisle, however, traffic therein was approximately the same as in the other aisles of the store. On redirect examination, this witness testified that the aisle in which plaintiff was hurt was approximately eight feet wide.

The plaintiff's husband, Glen McKinney, testified and

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corroborated much of the plaintiff's prior testimony. He stated that upon reaching the last aisle of the store, he placed his cart against the corner of the beer display and on an angle. The tops of the top two cartons in this display had been removed so that the cardboard bottom of the top carton was resting on the bottle caps of the bottles in the exposed carton immediately below it. Customer traffic in this aisle was heavy. After placing dairy products in his cart, the plaintiff's husband pulled the cart from the front, rather than pushing it, as he had done earlier that morning. He pulled the cart with enough force to get it rolling, but the cart hit something, and he then saw beer bottles falling from the top of their display. Some of the bottles fell to the floor, broke, and his wife was cut in the foot. As this witness was holding up the beer cartons, other people took his wife from the store. In talking to a representative from the defendant's supermarket immediately after the beer bottles had broken, this witness stated he was sorry that he had broken the bottles and was willing to pay for them. The other man said: "That's all right; I guess it's my fault too."

On cross-examination, this witness stated that at the time of his wife's injury, their cart was one-half to two-thirds full. He always went shopping with his wife and would push the cart as she selected the products. He had used these carts before and supposed he knew that they fishtailed when one pulled them from the front, as opposed to pushing them from the back. He pulled the cart from its front, and it touched the beer display. The beer fell only after he hit the display or stack. The lighting around the display and the floor was not defective. There was not any debris on the floor. There were four or five cases in this beer display. None of the cases fell to the floor; only some of the bottles did. The rear end of the cart hit this display

as he pulled the cart from its front and was leaving the beer display area. The beer display extended one foot into the width of the aisle reducing its width to five feet in the observation of this witness. He further stated that he didn't notice any of the stacked bottles out of line and didn't notice anything improper about the stacking.

This concluded the plaintiff's evidence. The court then directed a verdict for the defendant. In seeking a reversal of the adverse judgment and a remandment for a new trial, the plaintiff contends: (1) since general negligence was charged in her statement of claim and the plaintiff proved that an accident occurred resulting in injuries without her contributory negligence, a presumption of defendant's negligence was created and the court erred in directing a verdict for the defendant; (2) since there was evidence that plaintiff's injury was one which, in the exercise of due care, the defendant ought to have reasonably foreseen, the trial court erred in directing a verdict for the defendant.

It is apparent from the cases cited by the plaintiff in support of her initial contention that she is urging the cause at bar to be both a res ipsa loquitur case and a case involving specific acts of negligence on the part of the defendant. The plaintiff's statement of claim contains allegations of both general and specific negligence. However, this is not a res ipsa loquitur case. The purpose of the doctrine of res ipsa loquitur is to allow proof of negligence by circumstantial evidence when direct evidence concerning the cause of injury is primarily within the knowledge and control of the defendant. Metz v. Central Illinois Electric & Gas Co., 32 Ill. 2d 446, 207 N.E. 2d 305 (1965). After the plaintiff has introduced evidence supporting the res ipsa loquitur allegation, the defendant then has the burden of proof and must introduce evidence to rebut this presumption of negligence.

The burden of proof shifts to the defendant on the theory that the evidence is more readily available to the defendant than to the plaintiff. At the close of the case, the jury takes the evidence offered by both sides and renders its verdict.

In the instant case, the plaintiff did not know what caused her injury at the time she was struck in the foot, but in the intervening period between the date of the accident and the date her statement of claim was filed, she must have discovered, in her conversations with her husband, that her personal injuries were caused by either his negligence or by the defendant's negligent stacking and placement of the beer display. Her husband had direct evidence of the events occurring immediately prior to the time her injuries were sustained so the plaintiff had no necessity to rely upon circumstantial evidence and seek to shift the burden of proof to the defendant. The case at bar does not involve a bottle exploding on the premises of the defendant due to unknown causes or a bottle falling from the top of its display due to an unknown impetus. Such cases would support general allegations of negligence charged to the defendant employing the res ipsa loquitur doctrine. In the instant case, direct evidence concerning the cause of the plaintiff's injury was not primarily within the knowledge and control of the defendant. The plaintiff's husband and not the defendant had primary knowledge of the events culminating in the plaintiff's injuries. Therefore, the doctrine of res ipsa loquitur is not applicable to the case at bar.

Secondly, the plaintiff urges that the trial court erred in directing a verdict for the defendant at the close of her evidence because such evidence showed that her injury was one which, in the exercise of due care, the defendant ought to have reasonably foreseen and anticipated. This argument brings us to the most crucial issue in this case--the chain of causation, remote

cause, and intervening cause.

Was the plaintiff's injury proximately caused by the negligence of her husband in parking their cart on an angle against the beer display in this crowded aisle and by his later pulling it rather than pushing it which resulted in its touching the display, causing bottles to fall and causing the plaintiff to sustain the injuries for which she now sues? Or was such action on the part of a customer to be reasonably foreseen and anticipated by the defendant when it placed this display in its most popular aisle, possibly obstructed the aisle, and stacked the beer in such a manner that the cardboard bottom of the top beer carton rested on the bottle tops of the bottles in the carton immediately below it resulting in the defendant's negligence being the proximate cause of the plaintiff's injuries? Furthermore, should such issues have been submitted to the jury and not decided by the court? The answers to these questions will constitute the remainder of this opinion.

The legal relationship between the defendant and the plaintiff in the case at bar is one of storeowner and business invitee. A storeowner is not the insurer of his customer's safety but rather liability must be founded on fault. Olinger v. Great Atl. & Pac. Tea Co., 21 Ill. 2d 469, 173 N.E. 2d 443 (1961). A storeowner, however, does owe a duty to his business invitees to exercise ordinary care in maintaining the premises in a reasonably safe condition. Garrett v. National Tea Co., 12 Ill. 2d 567, 147 N.E. 2d 367 (1958); Saviola v. Sears, Roebuck & Co., 88 Ill. App. 2d 13, 232 N.E. 2d 4 (1967). Under tort principles, the breach of this duty must also be the proximate cause of the invitee's injury.

We have carefully examined the record in this case and are of the opinion that the proximate cause of the plaintiff's

injury was the negligence of her husband in parking their cart, on an angle, next to the beer display, and in later pulling their cart from the front, rather than pushing it from the rear, which resulted in the cart hitting the beer display and the bottles falling from their carton. The plaintiff's husband did testify on cross-examination that he supposed he knew that the carts fishtailed when one pulled them from the front.

In Kirchoff v. Tzinberg's Park "N" Shop Food Stores, 7 Ill. App. 2d 201, 129 N.E. 2d 279 (1955), the reviewing court affirmed a judgment in which the trial court had directed a verdict for the defendant storeowner at the close of all the evidence. The plaintiff was a business invitee and was injured by a piece of glass shot into the top of her foot by an exploding bottle of root beer which had been allegedly mishandled by the defendant storeowner. The evidence disclosed that beverage bottles were stacked on top of each other in six-bottle cartons to a height of four or five feet. These cartons were stacked against a wall and extended onto the floor of the store for about three feet. As a woman customer, other than the plaintiff, was lifting her carton of beverage and came down with it, her carton brushed against a lower carton causing the latter carton to come down and strike a quart bottle of root beer which was resting in its carton on the floor itself. The quart bottle of root beer then exploded and a piece of its glass flew and cut the plaintiff on the foot. The reviewing court stated in that case that the defendant was not at fault and that it was not an insurer of the safety of business invitees on its premises. The facts of the cited case and the facts of the instant case are similar. We agree with the trial judge and hold from the evidence received that the negligence of the plaintiff's husband was an intervening cause within the facts of this case, and was, in fact, the proximate cause of the

plaintiff's injury. Any negligence on the part of the defendant was the remote cause of her injury.

The trial court did not err when it directed a verdict for the defendant at the close of the plaintiff's evidence. In Pedrick v. Peoria & Eastern R. R. Co., 37 Ill. 2d 494, 229 N.E. 2d 504 (1967), the Illinois Supreme Court had occasion to liberalize the powers of the trial judge in directing verdicts and stated that it was the duty of the trial court to direct a verdict if all the evidence, when viewed in its aspects most favorable to the opponent, so overwhelmingly favored the movant that no contrary verdict based on that evidence could ever stand. This is such a case.

Accordingly, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and MC CORMICK, J., concur.

DAVID H. HYNES,)	
Plaintiff-Appellee,	)	APPEAL FROM
)	
v.)	
	)	CIRCUIT COURT
MARION JOHNSON, a/k/a THOMAS)	
JOHNSON, and GERTRUDE JOHNSON,)	
a/k/a LOLES JOHNSON,	)	COOK COUNTY.
Defendants-Appellants.)	
)	
PEOPLE OF THE STATE OF ILLINOIS,	)	HON. JAMES M. BAILEY,
Appellee,	)	Presiding.
)	
v.)	
)	
MARION JOHNSON, a/k/a THOMAS)	
JOHNSON, and GERTRUDE JOHNSON,)	
a/k/a LOLES JOHNSON,)	
Contemnor-Appellants.)	

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Marion Johnson and Gertrude Johnson appeal from an order adjudging them guilty of direct contempt of court and sentencing each of them to ten (10) days in the County Jail. The order was entered on the court's oral motion for a rule to show cause why the defendants should not be held in contempt of court for presenting as evidence, rent receipts which were allegedly altered and testifying that the receipts were in the same condition as when received by them.

The defendants' conviction cannot rest on the basis of an indirect contempt proceeding since no notice, citation or rule to show cause was filed, nor can the order be sustained on the basis of a direct contempt since the elements of the offense were not within the personal knowledge of the magistrate.

A conviction for a direct contempt does not require a formal charge, evidence, issue, or trial, since the contempt has been committed in the presence of the court. It is apparent from the order that there was no testimony that the defendants altered the receipts, nor is there any testimony set out in the order that the receipts were not in the same condition as received by the defendants. The magistrate was holding the defendants guilty of direct contempt

because they perjured themselves in testifying that the receipts were in the same condition as received by them. In a case of direct contempt the court may act upon that of which it may take judicial notice, but it cannot judicially know that evidence is false unless at the trial it is so made to appear by the witness's own admission or perhaps by unquestioned and incontrovertible evidence. See *People v. Harrison*, 403 Ill. 320; *Ex parte Hudgings*, 249 U.S. 378; *People v. Koniecki*, 28 Ill. App. 2d 483.

The judgment should be reversed because it fails to show any facts as a basis for finding the defendants guilty of contempt. The cases recognize the power of a court to punish for direct contempt committed in the presence of the court and to administer punishment in proper cases. However, the accused has a right of appeal and it is necessary for the court to enter a written order setting forth clearly and fully the facts out of which the contempt arose so that the reviewing court may determine if the committing court had jurisdiction to enter the order. All the essential facts must be fully set forth and no facts which did not occur in the presence of the court should be taken into consideration in adjudging guilt or in fixing the punishment. See *People v. Tavernier*, 384 Ill. 388; *People v. Loughran*, 2 Ill. 2d 258; *People v. Bialek*, 31 Ill. App. 2d, 281. There is no testimony set out in the order that defendants made any admission as to false testimony, nor is there any testimony set out in the order as to the questions asked the defendants and their answers thereto. For these reasons the order adjudging the defendants guilty of contempt and sentencing them therefor is reversed.

ORDER REVERSED.

Lyons, J., and McCormick, J., concur

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

1041.A²270

BETTY RUNGE and ELROY RUNGE,)
)
 Plaintiffs,)
 -vs-)
)
 LARKIN I. SMITH,)
 Defendant.)
 and)
)
 LARKIN I. SMITH,)
)
 Defendant, Counter-)
 Plaintiff and Appellee,)
 -vs-)
)
 BETTY RUNGE,)
)
 Plaintiff-Counter-De-)
 fendant and Appellant.)

Appeal from the Circuit Court
of Effingham County, Illinois.

Honorable F. R. Dove,
Judge Presiding.

FILED
DEC 31 1968

George J. Moran, J.

George J. Moran
CLERK OF THE APPELLATE COURT
FIFTH DISTRICT OF ILLINOIS

Betty and Elroy Runge, husband and wife, brought this action in the Circuit Court of Effingham County, seeking damages for personal injuries sustained by Betty Runge and property damage sustained by Betty and Elroy Runge occasioned by the alleged negligence of the defendant, Larkin Smith in driving an automobile. Larkin Smith filed a counterclaim against Betty Runge to recover damages for personal injuries caused by her alleged negligence in driving the automobile owned by her and her husband. The jury rendered a verdict against the plaintiffs upon their complaint and in favor of defendant and counter-claimant on his counterclaim. Plaintiff, counter-defendant, Betty Runge appeals from the judgment entered against her on the counterclaim. The plaintiff will hereafter be referred to in this opinion as Runge and the defendant, counterclaimant Larkin Smith will be referred to as Smith.

On August 4, 1965 Smith was driving a 1958 Chevrolet Corvette owned by his mother, on a road commonly known as Altamont-Farina blacktop. He stated that he continued south on this road until he came to a country intersection where he made a right turn and headed west. After traveling a distance of about 200 yards, he turned

around in the roadway and returned to the blacktop and stopped where there was a stop sign, looked north and south, saw there was no traffic coming, and proceeded across the intersection toward the east at a speed of less than five miles per hour. Thinking he heard a car horn, Smith looked to the north and saw the car driven by Betty Runge. At this point he said his car was straddling approximately the center of the road. The road is about 20 feet wide. Smith estimated that the Runge car was 554 feet away when he first saw it and traveling at 75 miles per hour. After he saw the Runge car, Smith stated that he accelerated his speed. He claims that the collision occurred completely in the northbound lane of the Altamont-Farina Road and with his car being located on that portion of the pavement consisting of the northbound lane and partially off the road to the east.

Runge testified that she was driving south on the Altamont-Farina blacktop using the proper lane when she saw Smith's car in the middle of the road. She stated that she immediately applied her brakes and swerved to the left. On cross-examination she also stated that to her recollection, she never saw Smith's car move and at the time of the collision part of Smith's car was still in the southbound lane. Her testimony also revealed that she had two highballs before leaving work and heading home and that just prior to seeing Smith's car in the middle of the road, she had glanced down in the seat in search for her cigarettes. She further testified that she was traveling 55 to 60 miles per hour just prior to the accident.

Both Runge and Smith agree that the collision occurred seconds after each had seen the other. Runge testified that it could have been as much as five seconds.

The accident took place at approximately 3:30 p.m. on a bright, sunny day. The road was in good shape and both Runge and Smith stated that they were familiar with the road. The Altamont-Farina blacktop road, about a mile out of Altamont, dips into a valley and then goes up a fairly steep incline. At the top of this incline the road levels off and the intersection is located in this level area.

Roy McEndollar testified on behalf of Runge that he was working near a barn about 275 feet west of the intersection when the accident occurred. He stated that he saw the Chevrolet Corvette come up to the intersection, hesitate and drive east.

He said that he never saw the Corvette on the east-west road, west of the intersection. After Smith's car had driven out of sight, he stated that he saw Runge's car coming south on the blacktop.. He then looked away and a few seconds later he heard a crash. He did not see the impact itself. He also testified that he thought the car driven by Smith was attempting to make a U-turn.

Cross-examination of McEndollar revealed that he had been acquainted with Mrs. Runge for 25 years but that he had never known Larkin Smith. McEndollar also stated that he had given a statement of his observation of the facts of the accident to Runge's counsel but had refused to give a similar statement to Smith's counsel.

Jack M. King, a state trooper who investigated the accident, testified on behalf of Runge that he observed approximately 113 feet of skid marks coming from the north going south leading up to the intersection in question and which commenced in the southbound lane of traffic and veered into the northbound lane. He also saw four marks which he described as black tire marks about eight inches long. These marks extended east and west and from the tire marks on the highway there were marks leading to the rear of the Corvette.

King also testified that on the day of the accident or the following day, he had a conversation with Smith in his hospital room after surgery, where Smith stated that he had pulled into the west intersection to make a U-turn and head back north. According to the trooper, Smith further stated that he saw he was not able to straighten the car out enough to go back north and that he decided to pull across the highway into the right intersection. The trooper also testified that Smith told him that there was some minor problem with the automobile he was operating at the time of the occurrence and he was test driving the car for his brother. There was no direct evidence on this alleged behavior on the part of Smith and he stated that he did not know whether he made that statement to the trooper or not.

Runge contends that Smith was guilty of contributory negligence as a matter of law and is thus praying that this court enter a judgment notwithstanding the verdict. Her theory is that if she was 554 feet away from the intersection when Smith first saw her approaching, and if he was moving when he saw her, all as testified to by Smith, then it would be physically impossible for him not to cross the highway before Runge



crossed the intersection unless he was negligent. Runge further argues that if Smith failed to cross the highway because his car would not travel fast enough, then it was negligence for him to attempt the crossing.

In order for us to enter a judgment notwithstanding the verdict, it must be shown that "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill 2d 494, 510. We cannot so find because there were enough conflicting facts and evidence of due care on the part of Smith to justify the verdict rendered by the jury in favor of Smith. It was entirely within the province of the jury to determine that Smith had cleared the southbound lane of traffic and that the accident was caused solely by Runge's negligence in veering to the left into the northbound lane. It is also impossible to attempt to mathematically compute how far Smith should have traveled after he saw Runge's car because both Runge and Smith were unsure of the exact amount of seconds which ticked away between the time they saw one another and the time they collided. Also, there is no direct evidence which proves that Smith was knowingly driving a mechanically defective car, the operation of which would expose him to unreasonable danger.

Our review of all the evidence does not coincide with Runge's contention that Smith was guilty of contributory negligence as a matter of law and that she is therefore entitled to a judgment notwithstanding the verdict.

Plaintiff also contends that the trial court erred in ruling on her objection to certain evidence.

At the trial Runge testified that within eight weeks after the accident she was able to engage in all of the activities she normally did before the accident. Counsel for Smith inquired as to why she was so sure of the time, that is, eight weeks. her answer was, "Because I played softball and after six weeks, I called Dr. Moore and asked if I could and he said no, two more weeks." Counsel for Smith was then permitted to refer to Runge's discovery deposition and read the following questions and answers:

Q. Are there any activities now, by way of work or any recreational activities, you don't engage in you could before the accident?

A. No.

Q. You can still do everything you did before the accident?

A. Yes.

Q. That was your condition approximately six weeks after this accident?

A. That's right. I had to be careful with my rib but he he discharged me. He didn't let me play ball."

At this point, counsel for Runge interjected, "We object and ask that this be stricken as improper." The trial court overruled this objection. A general objection such as the one here is sufficient only to raise the questions of relevancy and materiality. Gard, Illinois Evidence Manual, Rule 507, and the Illinois cases cited therein.

Runge finally contends that the jury was improperly instructed. This argument grows out of the trial court's refusal to accept Runge's instruction No. 10 which was I.P.I. Form No. 2.06 and provided: "An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness." This instruction was directed to the fact that Runge's witness, Roy McEndollar, testified that he had given a pre-trial statement to Runge's counsel but had refused to do the same for Smith's counsel. It is Runge's view that the refusal to tender this instruction caused the trial to be conducted in an atmosphere of favor and advantage to Smith.

Giving due consideration to the facts of this case, it does not appear that Runge is justified in making this argument. All evidence that shows the bias or prejudice of a witness is material to the trial of a cause. McEndollar's refusal to give a statement to Smith's counsel was surely proper material for cross examination. Goertz v. Chicago and North Western Ry. Co., 19 Ill^{App}2d 261. Acceptance of Runge's Instruction No. 10 would neglect the fact that McEndollar refused to give a statement to Smith's counsel and would only bear on the question of the propriety of his talking to Runge's counsel. We agree with the trial court that this proffered instruction did not completely cover the factual scope of this case and that the giving of it would

have been misleading to the jury.

For the foregoing reasons, the judgment of the Circuit Court of Effingham County is affirmed.

Judgment Affirmed.

CONCUR:

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

PUBLISH ABSTRACT ONLY.

FILED

JAN 30 1969

No. 68-31

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

Walter J. Simmons
 CLERK OF THE APPELLATE COURT
 FIFTH DISTRICT OF ILLINOIS
File

In The Matter of The Estate of)	
RICHARD PICKENS, Also Known)	
as RICHARD E. PICKENS, Deceased.)	
_____)	
	)	Appeal from the Circuit Court
FRANK BONAN, Individually and as	)	of Hamilton County, Illinois.
Executor of the Will of Richard)	
Pickens, Deceased,)	
)	
Petitioner below, Appellee herein,)	
)	
-vs-	)	Honorable John D. Daily,
	)	Judge Presiding.
CURTIS G. PICKENS, et al, The Heirs At)	
Law of Richard Pickens, Deceased,)	
)	
Respondents below, Appellants herein.))	

George J. Moran, J.

Respondents appeal from an order of the Circuit Court of Hamilton County admitting the last will of Richard Pickens, deceased, to probate.

Under the terms of the will of decedent who was a bachelor, Frank Bonan was appointed executor and trustee of a trust for the decedent's mother. The will further provided that after the death of decedent's mother, or at the death of decedent, if she predeceased him, the entire estate should go to the three children of Frank Bonan, share and share alike. Since decedent's mother predeceased him, by the terms of the will the children of Frank Bonan are to receive the entire estate which is estimated in the petition to probate the will at \$400,000.00.

The only testimony produced at the hearing on the petition to probate the will was from the attesting witnesses and from Frank Bonan. The testimony disclosed that the will was prepared and signed on December 28, 1964 during working hours in the office of Frank Bonan, an attorney who had been the confidential advisor to decedent for many years. It was witnessed by Mr. Bonan's secretary and two other persons who worked in the vicinity. The attesting witnesses testified that Richard Pickens signed, sealed and declared the said instrument in writing to be his last

will and the signature by the decedent occurred in the presence of each of the witnesses, and that the witnesses each signed said will in the presence of the testator and in the presence of each other, and that the testator was of sound mind and memory, of lawful age, and under no constraint when the will was signed. They also testified that Mr. Bonan was present when the will was signed.

The Circuit Court of Hamilton County, Illinois, found that the will was attested in conformity with the law of the State of Illinois and that Richard Pickens was of sound and disposing mind and memory and otherwise competent to make the will at the time of signing the same. After so finding, the trial court admitted the will to probate and ordered that Letters Testamentary be issued to Frank Bonan. This appeal is taken by the heirs at law of decedent, from the order admitting the will to probate.

The heirs at law contend that the trial court erred in admitting the instrument to probate under Section 69 of the Probate Act (Ill. Rev. Stat., 1967, Ch. 3, Section 69) which reads:

"When each of 2 attesting witnesses to a will testifies before the court (a) that he was present and saw the testator or some person in his presence and by his direction sign the will in the presence of the witness or that the testator acknowledged it to the witness as his act, (b) that the will was attested by the witness in the presence of the testator, and (c) that he believed the testator to be of sound mind and memory at the time of signing or acknowledging the will, the execution of the will is sufficiently proved to admit it to probate unless there is proof of fraud, forgery, compulsion, or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will. The proponent may also introduce any other evidence competent to establish a will in chancery. If the proponent establishes the will by sufficient competent evidence it shall be admitted to probate unless there is proof of fraud, forgery, compulsion, or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will."

They argue that the testimony of Frank Bonan at the hearing raised a presumption of undue influence, because he prepared the will and his children were to receive the estate; that the proponents of the will did not offer any evidence to rebut this presumption; and that such presumption of undue influence was evidence of improper conduct which was sufficient to invalidate the will in the absence of evidence to overcome it.



In our opinion, appellants contend contrary to the holdings of our Supreme Court in *Shepherd v. Yokum*, 323 Ill 328 and in *Berndtson v. Heuberger*, 21 Ill 2d 557, wherein the court said at 562-63:

"At the hearing in the probate court, no evidence of fraud, forgery, compulsion or other improper conduct was offered. In *Shepherd v. Yokum*, 323 Ill 328, we held that in the absence of such proof the court is required to admit a will to probate upon proof of the statutory requirements. In that case, the opponent to the will contended that the will was not entitled to probate by reason of a presumption of undue influence arising from the fact that *Shepherd* prepared the will, was present at its execution, and was its chief beneficiary. In concluding that such will was admissible to probate it was held that in a hearing in probate undue influence is not within the realm of inquiry and that the court has no power to make a finding or enter a judgment in respect thereto. Such ruling has been followed in *In re Estate of Ostrowski*, 3 Ill App 2d 431."

Our holding that undue influence is not within the realm of inquiry under Section 69 of the Probate Act (Ill. Rev. Stat., 1967, Ch. 3, Sec. 69) does not preclude this contention being made should a proceeding be brought to contest the will under Section 90 of the Probate Act (Ill. Rev. Stat., 1967, Ch. 3, Sec. 90).

□□ For the foregoing reasons, the order of the trial court of Hamilton County, admitting the last will and testament of Richard Pickens to probate, is affirmed.

Order Affirmed.

CONCUR:

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

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